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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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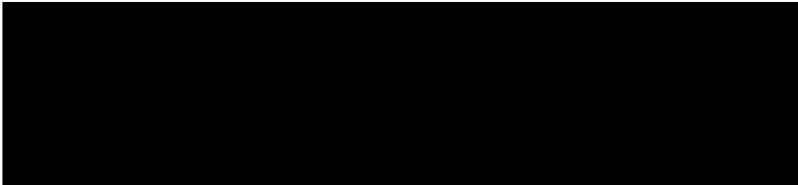
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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: **DEC 29 2010**

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an assisted living facility for the elderly with 37 employees that seeks to employ the beneficiary as an assistant care coordinator. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the director's RFE; (4) the director's denial letter; and (5) Form I-290B with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner states that it is seeking the beneficiary's services as an assistant care coordinator. In the October 22, 2008, letter of support, the petitioner states that the beneficiary will:

- Provide prescheduled administrative coverage for the facility, including making rounds and being rotationally on call;
- Prepare monthly scheduling for caregivers and arrange for backup coverage;
- Coordinate care planning with the medical staff and family members;
- Arrange for special needs of residents;
- Report any known or suspected elderly abuse;
- Supervise the inventory, ordering, storage, and dispensation of medications as well as supervising cleanliness; and
- Maintain and read all shift communication notes.

The petitioner also stated that it requires the person who fills this position to have at least a bachelor's degree in a relevant field, without specifying that the degree needs to be in a specific specialty. The petitioner went on to say that its current residential care coordinator, which the petitioner claims is parallel to the position proffered, holds a four-year nursing degree. The beneficiary's foreign education has been evaluated as

equivalent to a U.S. bachelor's degree in psychology.

The director's RFE asked for documentation to support a finding that the proffered position is a specialty occupation, including, in part, a more detailed job description.

In the response to the RFE, the petitioner broke down the day-to-day responsibilities as follows:

- Providing support to the medical technician function, including dispensing prescription medications, overseeing inventory of medications, and demonstrating care and concern for the general welfare of residents (50%);
- Administrative collaboration, including making rounds and being on-call (15%);
- Scheduling (10%);
- Coordinating care planning (10%);
- Shift management (10%); and
- Special needs and reporting (5%).

Additionally, the petitioner submitted an organizational chart, which indicates that the beneficiary would be directly supervised by the petitioner's resident care coordinator. This contradicts the petitioner's statement that the beneficiary's position is parallel to the resident care coordinator.

The petitioner also submitted copies of advertisements for Assisted Living and Care Coordinators, which require at least a bachelor's degree generally or a bachelor's degree in a human-service related field. The advertisements do not state that at least a bachelor's degree in a specific specialty is required for these positions.

The director denied the petition finding that the proffered position is not a specialty occupation.

On appeal, counsel for the petitioner admits that a large number of the proffered duties "[d]o not really require the services of one with a baccalaureate degree and we will not take issue on these. . . ." However, counsel argues that three of the duties the beneficiary will perform – care and supervision of the activities and welfare of the residents, reporting elderly abuse, and coordinating care planning – are better served by an individual with professional knowledge in the field of psychology. While it may be the case that someone with a background in psychology or a related field is more qualified to perform some of the proffered duties than someone who does not, this does not meet the standard under the Act, which states that a specialty occupation requires, at a minimum, at least a bachelor's degree or the equivalent in a specific specialty. Indeed, the petitioner never specifically states that it does require that the person who fills this position hold at least a bachelor's degree or the equivalent in psychology or a closely related field. Additionally, according to the petitioner's breakdown of the proffered duties into percentages, the duties that counsel admits do not require the services of one with at least a bachelor's degree or the equivalent comprise the majority of the proffered duties. Therefore, counsel's argument that the proffered position is a specialty occupation is not persuasive.

To make its determination whether the employment qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its

equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO finds that the proffered position fits best under the *Handbook's* description of nursing and psychiatric aides as follows:

Nursing and psychiatric aides *help care for physically or mentally ill, injured, disabled, or infirm individuals in hospitals, nursing care facilities, and mental health settings. Nursing aides and home health aides are among the occupations commonly referred to as direct care workers, due to their role in working with patients who need long-term care. The specific care they give depends on their specialty.*

Nursing aides, also known as nurse aides, nursing assistants, certified nursing assistants, geriatric aides, unlicensed assistive personnel, orderlies, or hospital attendants, provide hands-on care and perform routine tasks under the supervision of nursing and medical staff. Specific tasks vary, with aides handling many aspects of a patient's care. They often help patients to eat, dress, and bathe. They also answer calls for help, deliver messages, serve meals, make beds, and tidy up rooms. Aides sometimes are responsible for taking a patient's temperature, pulse rate, respiration rate, or blood pressure. They also may help provide care to patients by helping them get out of bed and walk, escorting them to operating and examining rooms, or providing skin care. Some aides help other medical staff by setting up equipment, storing and moving supplies, and assisting with some procedures. Aides also observe patients' physical, mental, and emotional conditions and report any change to the nursing or medical staff.

Nursing aides employed in nursing care facilities often are the principal caregivers and have more contact with residents than do other members of the staff. Because some residents may stay in a nursing care facility for months or even years, aides develop positive, caring relationships with their patients.

Psychiatric aides, also known as mental health assistants or psychiatric nursing assistants, care for mentally impaired or emotionally disturbed individuals. They work under a team that may include psychiatrists, psychologists, psychiatric nurses, social workers, and therapists. In addition to helping patients to dress, bathe, groom themselves, and eat, psychiatric aides socialize with them and lead them in educational and recreational activities. Psychiatric aides may play card games or other games with patients, watch television with them, or participate in group activities, such as playing sports or going on field trips. They observe patients and report any physical or behavioral signs that might be important for the professional staff to know. They accompany patients to and from therapy and treatment. Because they have such close contact with patients, psychiatric aides can have a great deal of influence on their outlook and treatment.

(Emphasis added.) Therefore, the proffered position's duties fit into the occupational classification of nursing and psychiatric aides, including the three duties espoused by counsel on appeal as qualifying the proffered position as a specialty occupation.

Under the section on Training, Other Qualifications, and Advancement, the *Handbook* states that:

In many cases, a high school diploma or equivalent is necessary for a job as a nursing or psychiatric aide. Specific qualifications vary by occupation, State laws, and work setting. Advancement opportunities are limited.

Because the *Handbook* indicates that working as a nursing or psychiatric aide does not normally require at least a bachelor's degree in a specific specialty, the *Handbook* does not support the proffered position as being a specialty occupation. The AAO further finds that, to the extent that they are described in the record of proceeding, the duties comprising the proffered position do not comport with any occupational category for which the *Handbook* indicates a minimum entry requirement of at least a bachelor's degree, or the equivalent, in a specific specialty.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. As stated previously, the advertisements submitted do not reflect a common requirement for at least a bachelor's degree or its equivalent in a specific specialty.

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for nursing and psychiatric aide positions, or the petitioner's own statement that the position requires at least a bachelor's degree, without specifying that this degree must be in a specific specialty.

Next, as the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner did not provide any information about who, if anyone, previously worked for the petitioner in the proffered position. Also, as was demonstrated previously through the petitioner's organizational chart, the resident care coordinator position is not parallel to the one proffered in this petition. Moreover, according to the petitioner, the person in the resident care coordinator position holds a four-year degree in nursing, which is not a closely related field to psychology.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The proposed duties do not indicate that they are more specialized and complex than those of nursing and psychiatric aide positions that are not usually associated with at least a bachelor's degree in a specific specialty.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). For this reason, the petition will be denied.

The petition will be denied and the appeal dismissed. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.